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No. 86-1629

In The

Supreme Court of the United States

October Term, 1986

511 DETROIT STREET, INC., a Michigan corporation, and EXECUTIVE ART STUDIO, INC., a Michigan corporation,

-v- *Petitioners,*

HON. FRANK J. KELLEY, In his official capacity as Attorney General, State of Michigan, et al.,

and *Respondents,*

DEQUINDRE BOOKS AND NEWS, INC., a Michigan corporation, and F. P. BOOKS AND NEWS, INC., a Michigan corporation,

-v- *Petitioners,*

HON. FRANK J. KELLEY, In his official capacity as Attorney General, State of Michigan, and L. BROOKS PATTERSON, In his official capacity as Prosecuting Attorney, County of Oakland,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT PROSECUTING ATTORNEY L. BROOKS PATTERSON IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHETHER THE WORDING OF THE MICHIGAN OBSCENITY STATUTE IS SUFFICIENTLY PRECISE SO AS TO GIVE MEN OF COMMON UNDERSTANDING WARNING AS TO WHAT CONDUCT IS FORBIDDEN AND TO SET FORTH READILY ASCERTAINABLE STANDARDS OF ENFORCEMENT?

II.

WHETHER THE SCIENTER REQUIREMENT INCLUDED IN THE STATUTE IS SUFFICIENT, AS WRITTEN OR AS IT MAY BE AUTHORITATIVELY CONSTRUED BY A STATE COURT, TO LIMIT THE REACH OF THE MICHIGAN OBSCENITY STATUTE ONLY TO KNOWING PURVEYORS OF OBSCENE MATERIALS?

III.

WHETHER THE STATE MAY IMPOSE SUBSTANTIAL FINES ON INDIVIDUALS CONVICTED OF VIOLATING CRIMINAL LAWS FOLLOWING AN ADJUDICATION OF GUILT UNDER THE MICHIGAN OBSCENITY STATUTE BY A JUDGE OR JURY?

IV.

WHETHER THE STATE OF MICHIGAN MAY DETERMINE THAT A COMPELLING INTEREST IN THE ERADICATION OF OBSCENITY JUSTIFIES THE IMPOSITION OF THE CRIMINAL FINES AND PENALTIES SET FORTH IN THE MICHIGAN OBSCENITY STATUTE ON OWNERS OF ESTABLISHMENTS DEALING PRIMARILY IN OBSCENE MATERIAL AND, IN SO DOING, CONSTITUTIONALLY PUNISH MAJOR OBSCENITY DEALERS MORE SEVERELY THAN OCCASIONAL SELLERS?

LIST OF PARTIES

The parties to this action below were the Petitioners, 511 Detroit Street, Inc.; Executive Art Studio, Inc.; Dequindre Books And News, Inc.; and F. P. Books And News, Inc.; and the Respondents, Frank J. Kelley, Attorney General for the State of Michigan; and L. Brooks Patterson, Prosecuting Attorney for the County of Oakland.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT PROSECUTING ATTORNEY L. BROOKS PATTERSON IN OPPOSITION

Respondent L. Brooks Patterson, Prosecuting Attorney in and for the County of Oakland, State of Michigan, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 807 F2d 1293 (1986).

STATEMENT OF THE CASE

Petitioners 511 Detroit Street, Inc. ["511 Detroit"] and Executive Art Studio, Inc. ["Art Studio"] filed in the United States District Court for the Eastern District of Michigan, Southern Division, a complaint for declaratory judgment seeking facial invalidation of section 5 of the newly-enacted Michigan Obscenity Statute [MCL 752.361-752.374] and a motion for preliminary injunction against enforcement of section 5 [MCL 752.365]. (Pet. pp E-1–E-12) This filing occurred on January 7, 1985, almost three months before the statute was to take effect on March 29, 1985. The filing was made in the Flint Division of the Eastern District and was accordingly assigned to District Judge Stewart A. Newblatt.

On March 26, 1985, the District Court struck down MCL 752.365 declaring it unconstitutionally vague, overbroad, and a prior restraint on free speech. (Pet. pp B-2–B-13) A judgment was filed March 27, 1985, and Respondent Kelley filed a Notice of Appeal on April 1, 1985.

Meanwhile, on March 13, 1985, Petitioners Dequindre Books And News, Inc. ["Dequindre"] and F. P. Books And News, Inc. ["F. P."] filed an identical complaint in the United States District Court for the Eastern District of Michigan, Southern Division, directed against Respondent Patterson, knowing that under local rule the action would be assigned to Judge Newblatt. On June 28, 1985, without conducting a hearing or other in-court proceeding, Judge Newblatt issued a memorandum opinion and order which essentially adopted his conclusions in the earlier opinion involving Petitioners 511 Detroit and F. P. (Pet. pp C-1–C-4) Both Respondents filed Notices of Appeal and these appeals were consoli-

dated with the appeal already pending in the 511 Detroit ~~Street~~ case.

On December 17, 1986, a three-judge panel for the Sixth Circuit Court of Appeals issued a unanimous opinion authored by Judge Boggs which reversed the decisions of the district court. *511 Detroit Street, Inc.* v *Kelley*, 807 F2d 1293 (CA 6, 1986) (Pet. Appen. A). The Sixth Circuit found the terms utilized in the Michigan Obscenity Statute "are found throughout civil and criminal codes, and throughout reported cases." The Court further found that the statute did not encourage arbitrary enforcement since an official seeking a conviction under MCL 752.365 would be required to first prove all of the elements of a second-degree offense (under MCL 752.366) — which Petitioners did not challenge — and then prove additional elements before a conviction could be obtained. The Sixth Circuit finally held that the large potential fines provided for in MCL 752.365 did not constitute a prior restraint because those fines would only be imposed following a judicial determination of obscenity. Once a finding of guilt has been made in a judicial proceeding, criminal sanctions can properly be imposed.

The Court did not address Petitioners' claims of equal protection and cruel and unusual punishment violations. These claims had not been addressed by the district court, either.

Petitioners moved for rehearing *en banc* in the Sixth Circuit. Their petition was denied on February 13, 1987. (Pet. p D-1) Without seeking a stay of the mandate, Petitioners have filed the instant petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY DECIDED THAT THE TERMS USED IN THE MICHIGAN OBSCENITY STATUTE WERE SUFFICIENTLY PRECISE.

Petitioners first argue that the Michigan Obscenity Statute is unconstitutionally vague. Specifically, Petitioners have argued that the terms "predominant", "regular part", "principal", "substantial", and "stock in trade" are too indefinite to allow men of common intelligence to understand them. Further, Petitioners contend, these words would give unfettered discretion to law enforcement officials and would thereby encourage arbitrary enforcement. The Sixth Circuit properly rejected these arguments.

As Respondent Kelley has pointed out (and as the Sixth Circuit acknowledged), these terms "are found thoughout civil and criminal codes, and throughout reported cases." *511 Detroit Street, Inc., supra,* at 1296. This Court recently reviewed a statute containing these phrases in response to a vagueness challenge concerning the use of the word "lust" as found in those statutes. *Brockett* v *Spokane Arcades, Inc.*, 472 US 491 (1985).

The Sixth Circuit correctly recognized that even though there might be speculative situations where it would be difficult to determine whether the establishments in question were subject to the challenged statute, that fact "does not make a statute unconstitutional . . . , particularly where the margin in question is not that between criminal and non-criminal conduct, but is, as here, that between degrees of criminal conduct." *511 Detroit Street, Inc., supra,* at 1296.

The Sixth Circuit further correctly recognized that there could be no danger of arbitrary law enforcement. Petitioners did not challenge the definitions of obscenity contained in both the sections defining first and second degree obscenity. Therefore the vagueness challenge was only directed at those terms set forth above which differentiated first from second degree obscenity. Since those terms "are within the common understanding of ordinary people" (*id.* at 1296), there is little likelihood of arbitrary enforcement based on a misunderstanding of the terms. The penalties between the two sections differ little — both being misdemeanors — and it is only the size of the potential fines which sets them apart. The essential elements of a second degree obscenity charge (which Petitioners do not challenge) must be proved and then the additional elements that make up a first degree obscenity charge are necessary to elevate the offense. The Sixth Circuit correctly recognized these facts would minimize the concern that an official might seek to enforce the first degree obscenity provision on a whim.

Petitioners have therefore failed to demonstrate error in the decision of the Sixth Circuit. Accordingly there is no reason to grant their petition for certiorari.

II.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY DECIDED THAT THE REACH OF THE MICHIGAN OBSCENITY STATUTE WAS SUFFICIENTLY LIMITED BY THE SCIENTER REQUIREMENT CONTAINED IN THE STATUTE.

Petitioners next contend that the Michigan Obscenity Statute is unconstitutionally overbroad. The Sixth Circuit properly rejected this argument.

As the Sixth Circuit recognized, MCL 752.365, "by its terms, applies only to one who knows 'the content and

character of the material.'" *511 Detroit Street, Inc., supra,* at 1297. This scienter element essentially tracks scienter language as expressed by this Court in *Hamling* v *United States,* 418 US 87, 123 (1974) and *Mishkin* v *New York,* 383 US 502, 510 (1966). MCL 752.362. A defendant must know the contents and character of the material in question in order to be convicted under the Michigan Obscenity Statute.

Although the Court of Appeals was troubled by certain language in MCL 752.362, it recognized (as the district court had refused to) that a narrowing state court interpretation of this troubling apparent presumption could "render unnecessary" the need for a federal court to make a determination of facial invalidity concerning an as yet unconstrued state statute. *511 Detroit Street, Inc., supra,* at 1298. [Respondent Kelley has sought to get the district court to certify this question to the Michigan Supreme Court, but Respondents have refused to join in this motion, preferring instead to seek relief in this Court.]

Finally, the Sixth Circuit also correctly determined that the Michigan Obscenity Statute was overbroad in that it might punish a bookseller's dissemination of protected materials since imposition of a large fine could be based upon the bookseller's total profits rather than just his profits derived from the sale of obscene (and therefore unprotected) materials. A sentencing court must individualize punishment in Michigan. *People* v *McFarlin,* 389 Mich 557, 574; 208 NW2d 504 (1973). This individualized assessment allows consideration of a defendant's ability to pay based upon his total financial condition. Such a determination is constitutional. *San Antonio School Dist.* v *Rodriguez,* 411 US 1, 22 (1973); *Bearden* v *Georgia,* 461 US 660, 670 (1983).

Since the Sixth Circuit properly rejected Petitioner's overbreadth argument, there is no reason for this Court to grant their petition for certiorari.

III.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY DECIDED THAT THE POTENTIAL FINES WHICH MAY BE IMPOSED FOLLOWING A CONVICTION UNDER THE MICHIGAN OBSCENITY STATUTE DO NOT CAUSE THE STATUTE TO OPERATE AS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON FREE SPEECH.

Petitioners next contend that the large potential fines which may be imposed under MCL 752.365 will have the effect of restraining future speech. The Sixth Circuit properly dismissed this argument.

As the Sixth Circuit stated:

> * * * The fact that a person does some business disseminating protected materials cannot immunize that person from large fines that may be imposed for violation of criminal law. * * *
>
> *511 Detroit Street, Inc., supra,* at 1299.

Likewise, this Court quite recently rejected a similar argument in *Arcara* v *Cloud Books, Inc.*, 478 US ___; 106 S Ct 3172, 3177; 92 L Ed 2d 568, 577 (1986):

> * * * [N]either the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment activities. * * *

This Court went on to note:

> * * * [W]e must reject the Court of Appeals' reasoning analogizing the closure order sought in this case to an unconstitutional prior restraint

> under *Near* v *Minnesota*, * * * . The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited — indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.
>
> 106 S Ct at 3177 fn 2.

Under the instant statute no materials are suppressed. Instead the dissemination of obscenity is provided with criminal consequences. Conviction for dissemination results in differing penalties. One who on one (or a few) occasion(s) disseminates obscenity can be penalized (after conviction) by a term of imprisonment *or* by a fine. One who knowingly disseminates obscenity as a predominant *and* regular part of his business *and* possesses obscene materials as a principal or substantial part of his stock in trade may (upon conviction) be subjected to a term of imprisonment or higher fines. Both types of convictions (first and second degree obscenity) are criminal misdemeanors. The degree of culpability is reflected in the potential fines which may be imposed.

The very essence of prior restraints is that they are governmental actions directed at suppression prior to adjudications. *Near* v *Minnesota*, 283 US 693 (1931); *Joseph Burstyn, Inc.* v *Wilson*, 343 US 495 (1951). The essence of the instant statute is not suppression at all, but the infliction of a severe criminal penalty after conviction. The severity of the penalty is a matter for the legislature,

not the judiciary. It is an expression of the legislative determination that the proliferation of obscenity is harmful to the health and welfare of the citizens of this state. A court should not substitute its beliefs for the determination of the legislature.

This Court has consistently held that following a criminal conviction, a court may properly impose fines and other criminal penalties on a convicted defendant. As stated by this Court in *Kingsley Books, Inc.* v *Brown*, 354 US 436, 441-442 (1957): "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." Each case must be viewed on its facts. In *Arcara, supra*, for example, the closure order would have shut down the bookstore completely for one year. Nevertheless, this Court declined to hold this incidental burden on the dissemination of speech-related materials unconstitutional.

The potential imposition of a large fine in some future case under MCL 752.365 may cause a bookseller to think twice before offering a particular publication to the public. But that "self-censorship" is no different than what occurs when a bookseller acts to withhold a book because of his fear of possible incarceration should the book be found obscene in a judicial proceeding. Moreover, the statute provides that a merchant who is concerned that some of his wares may be obscene can request an advisory opinion from the county prosecutor or the attorney general. MCL 752.371(1). The person may also commence an action for a declaratory judgment under MCL 752.371(2). The prosecutor or the attorney general bear the burden of proof in such an action. MCL 752.372. Such a scheme has been approved by this Court in *Bantam Books, Inc.* v *Sullivan*, 372 US 58, 71-72 (1963).

Under the circumstances, it cannot be said that Petitioners' First Amendment rights are impermissibly restrained so as to warrant the extreme remedy of judicial nullification. Their petition should therefore be denied.

IV.

THIS COURT SHOULD NOT CONSIDER PETITIONER'S EQUAL PROTECTION CHALLENGE WHERE THAT CLAIM HAS NEVER BEEN RULED ON BY THE LOWER COURTS AND WHERE ANY DIFFERENTIATION IN TREATMENT CONTAINED IN THE MICHIGAN OBSCENITY STATUTE IS JUSTIFIED ON THE BASIS OF THE STATE'S COMPELLING INTEREST IN CONTROLLING AND ERADICATING OBSCENITY.

Petitioners finally urge this Court to determine that the potential fines which may be imposed upon conviction serve to single-out booksellers, newsdealers, and theater operators for differential treatment since they are the only individuals likely to have sufficient stocks of potentially obscene materials to be concerned about the impact of the statute. In Petitioners' view this violates the constitutional prohibition against unequal treatment. US Const., amend. XIV. A decision on this question would be premature. The statute has not yet been enforced so no fines have been imposed. Moreover, this issue was not addressed or decided by the Sixth Circuit or the district court; therefore, a decision by this Court should await a more thorough discussion of this issue in some future case.

Should this Court decide to review this issue, it may readily determine that the Michigan Obscenity Statute does not deny equal protection to Petitioners (or other prospective defendants). The classification systems that are subject to equal protection attack are those that act before a constitutionally proper adjudication has

occurred. For example, systems which require segregation by race, sex, or alienage, all act without judicial intervention. They are legislative schemes utilized to restrict the access of certain specified groups to particular (otherwise permissible) activities on the basis of prohibited classes. The system of fines in the Michigan Obscenity Statute is not analogous to those legislative classification systems. Fines are imposed only after a conviction — which necessarily follows an adjudication that has determined that the materials in question are *not* protected by the First Amendment.

By passing this Act, the state legislature has indicated that it feels the elimination of obscenity is an important state purpose. This Court has recognized the validity of this viewpoint. *New York* v *Ferber*, 458 US 747, 760-761 (1982). As Respondent Kelley points out in his brief in opposition (at page 15), this Court in *Plyer* v *Doe*, 457 US 202, 216 (1982), has recognized that state legislatures must be given "substantial latitude to establish classifications". See also: *McGinnis* v *Royster*, 410 US 263, 269-270 (1973). Moreover, the fines must be judged from the viewpoint that they are "stiffer" because they are imposed for a conviction of an offense deemed more serious by the legislature than a second degree obscenity offense under MCL 752.366. The comparison between these fines and other criminal statutes is simply inappropriate.

Lower federal courts have rejected similar equal protection challenges to a state's ability to establish classification systems in the realm of obscenity. *Peipenburg* v *Cutler*, 649 F2d 783, 787 (CA 10, 1981); *M. S. News Co.* v *Casado*, 721 F2d 1281, 1291-1292 (CA 10, 1983).

Petitioners have expressed concern and dissatisfaction with the proposed operation of this statute because of its asserted impact on protected expression. However, this

statute carefully uses the standards of *Miller* v *California*, 413 US 15 (1973) to separate protected expression from obscenity. Having done so, the First Amendment protection extended to books and films ceases. Since fines would be imposed based upon dissemination of unprotected materials, the concerns of Petitioners are misplaced. There is no violation of their right to equal protection.

CONCLUSION

For the reasons set forth above, Respondent Patterson respectfully asserts that the petition for writ of certiorari should be denied.

Respectfully submitted,

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